

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**MICHAEL MOON,
Claimant Below, Petitioner**

**vs.) No. 100791 (BOR Appeal No. 2043467)
(Claim No. 200706135)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**GUYAN GOLF AND COUNTRY CLUB,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 1, 2010, in which the Board reversed a September 29, 2009, Order of the Workers' Compensation Office of Judges and granted an award of 15% permanent partial disability. In its Order, the Office of Judges reversed the claims administrator's award of 15% permanent partial disability and granted 22% permanent partial disability. The appeal was timely filed by the petitioner and a response was filed by the Guyan Golf and Country Club. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition, response, and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of

Appellate Procedure.

Mr. Moon asserts the Board of Review improperly determined that his partial disability award should be apportioned based upon his pre-existing cervical degenerative changes as there was no prior impairment rating for that injury. In holding that Mr. Moon was entitled to a 22% permanent partial disability the, Office of Judges held that Dr. Guberman “has painted a true picture of this claimants lasting permanent partial disability, which has resulted from the physical compensable injuries of this claim. Given that the claimant was asymptomatic before the physical compensable injuries of this claim, it is our belief that Dr. Guberman acted correctly in choosing not to apportion the claimant’s impairment due to preexisting degenerative conditions.” (September 29, 2009 Office of Judges Order, p. 8). It further held that Mr. Moon suffers from a 22% whole-person impairment as a result of his physical compensable claims and reversed the Claims Administrator’s award of 15% whole-person impairment. *Id.*, p. 9. In its holding, the Board of Review held Mr. Moon’s pre-existing condition was apportionable pursuant to W.Va. Code § 23-4-9b, thus, the Office of Judges erred in determining that apportionment was not necessary for Mr. Moon. (June 1, 2010 Board of Review Order, p. 2). As a result the Board of Review reinstated the Claims Administrator’s Order granting Mr. Moon 15% permanent partial disability for his compensable injury.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner’s request for 22% permanent partial disability is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman

DISQUALIFIED:

Justice Menis E. Ketchum